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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107

SUBJECT: Dorney Road Landfill, April 24, 1991  
comments on ESD from Steve T. Miano,  
Esquire

DATE: 5-6-91

FROM: Peter M Stokely  
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TO: Fran Costanzi, (3HW22)

This memo is to respond to the comments on the ESD provided to EPA on April 24, 1991 by Steve T. Miano, attorney for the PRP's of the Dorney Road Landfill. The comments provided by Mr. Miano and his consultant Dana Sanders, raised a number of issues including, an alleged incorrect identification of wetlands and determination of the extent of jurisdiction of Waters of the United States, the lack of substantiative requirements to require mitigation in this instance (ie. Nationwide Permits exempting the PRP from mitigation requirements), as well as issues regarding the value of the wetlands and their importance to the local area. I will address each one of these issues categorically.

**Identification of wetlands/jurisdiction:**

EPA recognizes that the wetlands at issue are occurring on a disturbed landfill surface and are the result of differential settling of fill material and/or past grading of the site. Neither of these activities, because they were instrumental factors in the formation of these wetlands, are grounds for not calling them jurisdictional wetlands under purview of the Clean Water Act. Wetlands created 100% by man can be and are regularly considered jurisdictional under the Clean Water Act.

In making this determination EPA used the Federal Manual for the Identification And Delineation of Jurisdictional Wetlands, January 1989. This manual lays out the procedure for identifying wetlands using three parameters, hydrophytic plants, wetland hydrology, and hydric soils. In making a wetlands determination on disturbed sites one must recognize upfront that classic natural wetland indicators may not be present.

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A field visit was made to the Dorney road site on August 10, 1990. Observed on site was relatively recent fill material, trash and disturbed soils typical of landfill surfaces. This disturbed setting forms the substrate in which both terrestrial and wetland ecosystems were found. In situations like this classic hydric soil indicators, formed over many centuries of saturation, such as gleyed and mottled soils may be lacking. In the case at hand, recently deposited reddish brown soils were found.

Where these soils were located in depressional settings on the landfill it is my opinion that they receive saturation for a period sufficient to be considered wetlands. On the day of my site visit, well into the growing season, I observed both saturated soil conditions as well as standing water in these depressional settings.

Hydrophytic vegetation, classified as obligate wetlands plants by the Fish and Wildlife Service, were found in these settings with other strong indicators of wetland hydrology such as oxidized root zones which are the result of the plants pumping oxygen into a soil substrate lacking oxygen such as those saturated for long duration by water. The obligate plants found in these areas include cattail (*Typha angustifolia*), spike rush (*Eleocharis* spp.) and Bull Rushes (*Scirpus* spp.). These plants are typically found in wetland settings greater than 99% of the time by definition.

I used this information regarding the presence of obligate wetland plants, the observed saturated and inundated depressions found in disturbed imported soils, and correlated these to aerial photography. I then delineated and measured the wetland areas observed on the aerial photography and verified in the field to arrive at the figure of approx 4.5 acres of wetlands and open water present on site. In addition the two man-made ponds occupying approximately one acre were measured separately.

In summary, using the three parameter approach outlined in the "federal manual", wetlands under jurisdiction of the Clean Water Act were determined to be present on site. The PRP's consultant also admits in his report that wetlands are found on site based on the use of the same "federal manual". In addition the PRP's attorneys recognize that jurisdictional wetlands are present on site by the amount of time they spent discussing the various Nationwide Permits that may be applicable to this site. If jurisdictional wetlands were not present no 404 permit requirements, not even nationwide permit requirements, would apply.

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### **Wetland Values:**

The question of the ecological value of these wetlands has been raised in the context of whether compensatory mitigation should be required. I recognize that these wetlands are growing in a contaminated environment and this is precisely the reason why I did not object to their loss through remediation. However, professional judgement based on field observations and aerial photography interpretation did yield some valuable information regarding these wetlands function.

As compared to the surrounding landscape of corn field and farms the Dorney Rd. landfill stands out as an island of biological diversity. The open water and vegetated wetlands act as a beacon to passing waterfowl. The usage of this wetland by waterfowl and other birds which tend to utilize wetland areas, as well as terrestrial species is documented in my report dated October 3 1990. The diversity of both terrestrial and aquatic flora that I observed in the field was very high as compared to the surrounding area (I observed over 20 species of plants in my short visit and this is by no means a complete list of species occurring on the site.).

I recognize that the attraction of wildlife to a contaminated landfill site needs addressed through remediation. I believe however that given the biological diversity and the local wildlife value this area represents that the loss of these wetlands should not go unmitigated. I feel especially strongly in this regard given the relative ease that mitigation could be realized when designing ecological diversity into the required storm water management basin. I feel that this approach can go along way to replacing the local values to wildlife that will be lost when these wetlands will be capped.

### **Policy/Regulatory**

According to EPA Policy on Floodplains and Wetlands Assessments for CERCLA Actions from William N. Hedeman, Director of the Office of Emergency and Remedial Response and Gene Lucero, Director of the Office of Waste Programs Enforcement the following considerations are relevant:

#### **Section II. Policy, Subsection B. Remedial Actions** **1. Consideration of Environmental Issues**

The procedures set forth in the National Contingency Plan (NCP) establish a process for conducting an analysis during the planning of remedial actions that is similar in content to the evaluation underlying an EIS.

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Therefore, for a remedial action to comply with the alternative but equivalent floodplain/wetland evaluation contained in Appendix A of 40 CFR Part 6, a wetlands assessment must be incorporated into the analysis conducted during the planning of remedial actions which is established by the NCP.

**b. Wetland assessment of alternatives**

In assessing the alternatives and their effects on wetlands, the RPM in conjunction with the Regional 404 staff should consider such factors as environmental effects, community welfare, cost and technology.

If no practicable alternative exists outside of wetlands, and the RPM has determined to allow a remedial action to occur in wetlands, then the RPM shall act to minimize the potential harm or to avoid adverse effects on wetlands. This includes action to allow restoration and preservation of the natural and beneficial values of wetlands.

**33 CFR Section 330.5 Nationwide Permits**

Nationwide 26: Nationwide Permit 26 applies to discharges of less than 10 acres of dredged or fill material occurring above headwaters (ie. above the point in a watershed where the average annual flow is less than 5 CFS). However, this proposed discharge is over 1 acre ( approx. 4.5 to 5.5 acres of wetlands are proposed to be filled) which triggers the pre-discharge notification procedure of NW 26 (33 CFR Section 330.7). In EPA Region 3 proposed discharges over 1 acre but otherwise qualifying for NW 26 are frequently considered as qualifying for discretionary individual permit review. When this type of discetion is taken NW 26 is no longer valid and the more rigourous individual permit review process is initiated. Mitigation is almost always a condition of individual permits. Even if discretionary authority is not taken mitigation is frequently made a condition of NW 26. Therefore I believe that mitigation is a legitimate requirement for this project to be substantively in agreement with NW 26.

Nationwide 20: My interpretation of NW 20 is it only applies to emergency removal actions as indicated by the reference to the Regional Response Team. The Regional Response Team is an 'inter-agency team activated to handle emergency removal actions in an expedited manner. The Dorney Rd. action is a remedial action which must concur with all ARARS including 404, which in my opinion NW 20 does not apply, therefore the more stringent individual permit review process is the ARAR.

Even if NW 20 were to apply the following management practices are required of all nationwide permits including NW 20 and NW 26:

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Section 330.6 Management Practices: ....the following management practices shall be followed to the maximum extent practicable, in order to minimize the adverse effect of these discharges on the aquatic environment...

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practicable alternatives.

(5) Discharges to wetlands shall be avoided.

It is my view that the requested mitigation is what is required to meet the Nationwide Permit requirements even if they were considered applicable to this case.

In summary, considering wetland identification and jurisdiction, local wetland value and function and relevant policy and regulation regarding wetlands I conclude that wetland mitigation is both warranted and required for the Dorney Rd. impacts.